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No. 03-230

# In the Supreme Court of the United States

ERNEST MOISE, ET AL., PETITIONERS

*v.*

JOHN M. BULGER, INTERIM DISTRICT DIRECTOR, FLORIDA, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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19 pp

## QUESTIONS PRESENTED

1. Whether the Acting Deputy Commissioner of the Immigration and Naturalization Service validly exercised his delegated authority in adjusting agency policy concerning the detention of certain inadmissible Haitian aliens arriving in South Florida.

2. Whether the district court abused its discretion in dismissing petitioners' claims without further evidentiary proceedings.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-3) is reported at 321 F.3d 1336. The opinion of the district court (Pet. App. 4-40) is reported at 204 F. Supp. 2d 1366.

### JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. A petition for rehearing was denied on May 13, 2003 (Pet. App. 41-42; Pet. 1). The petition for a writ of certiorari was filed on August 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The immigration laws provide that when an immigration official determines that an alien arriving at the border is inadmissible to the United States for lack of valid entry documents, the official "shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. 1158] or a fear of persecution," in which case the alien must be referred for an interview with an asylum officer. 8 U.S.C. 1225(b)(1)(A)(i). Aliens who establish at the time of their asylum interview that they have a "credible fear of persecution" if returned to their home country—*i.e.*, "that there is a significant possibility * * * that the alien could establish eligibility for asylum" in further proceedings—"shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii) and (v).[1]

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[1] On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the initial adjudication of asylum and refugee applications, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services (CIS). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (to be codified at 6 U.S.C. 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830 (2003) (to be codified at 8 C.F.R. Ch. V (Pts. 1001-1337)) (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization and termination of the INS, the INS and its officials were named as the lead respondents in this case. As explained below, none of the petitioners is presently in custody in the United States. Accordingly, there is no proper habeas corpus respondent who can

The release of those so-called "credible fear" aliens from their statutorily mandated detention is governed by the general immigration parole statute, 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) provides that the Attorney General, "in his discretion," may parole temporarily into the United States any alien applying for admission "under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A). Administrative regulations provide that, when the requirement of urgent humanitarian reasons or a significant public benefit is satisfied, parole may be granted if "the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. 212.5(b).

At the time of the relevant events in this case, the Attorney General had delegated his parole authority to the Commissioner of the INS. See 8 U.S.C. 1103(a) (2000); 8 C.F.R. 2.1 (2001). INS regulations stated, in turn, that

> [t]he authority of the Commissioner to continue an alien in custody or grant parole under [8 U.S.C. 1182(d)(5)(A)] shall be exercised by the district director [of the INS] or chief patrol agent, subject to the parole and detention authority of the Commissioner or her designees, which include the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director, any of whom in the exercise of discretion may invoke this authority under section [1182(d)(5)(A)].

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be substituted at this time, see 28 U.S.C. 2241(c), 2243, and we have accepted for purposes of this case petitioners' substitution of a CIS official as the lead respondent. See Pet. ii n.i.

8 C.F.R. 212.5(a) (as added by *Clarification of Parole Authority*, 65 Fed. Reg. 82,256 (2000)).

Parole determinations also were guided by INS's Detention Use Policy, which prioritized the use of the agency's limited detention space. See Pet. App. 26. That document established a general policy favoring the release of aliens who had established a credible fear of persecution in their home country, although parole of such aliens was discretionary in all cases and the Detention Use Policy contained an exception for "credible fear" aliens who posed a risk of flight or danger to the community. *Ibid.*

2. On December 3, 2001, the Coast Guard rescued 167 Haitian aliens from their "rickety and overloaded" boat, the Simapvivetzi, off the coast of South Florida. Eighteen other passengers of the Simapvivetzi swam to shore in Florida. Two persons on the boat apparently drowned. See Pet. App. 7.

None of the 167 persons rescued from the Simapvivetzi had valid documents for entering the United States. Accordingly, immigration officials determined that they were inadmissible to this country and placed them in expedited removal proceedings under 8 U.S.C. 1225(b)(1)(A). Pet. App. 7. When the INS conducted asylum interviews of those aliens in accordance with Section 1225(b)(1)(B), it determined that 165 of them had a credible fear of persecution. Those "credible fear" aliens were given an opportunity to seek asylum at a hearing before an immigration judge. Pet. App. 7-8 & n.3.

3. Concerned about an observed increase in life-threatening ocean crossings by Haitian migrants bound for the United States, and seeking to reduce the incentive to attempt such crossings, the Acting Deputy Commissioner of the INS instructed the agency's Miami

District office in mid-December 2001 that no undocumented arriving Haitians should be paroled without the approval of INS Headquarters. Pet. App. 8. The INS continued, however, to review parole requests by undocumented Haitian migrants on a case-by-case basis. Some applicants received parole. In March and April, 2002, the INS adopted exceptions to its Headquarters-approval policy to address the situations of successful Haitian asylum applicants and Haitians arriving by air or other regular means at designated ports of entry in South Florida. See *id.* at 8-9.

4. a. Petitioners are six Haitian nationals who were rescued from the Simapvivetzi, established a credible fear of persecution in their asylum interviews, and were allowed to present their asylum claims to immigration judges. Initially, the INS detained each of the petitioners during their immigration proceedings. See Pet. App. 9-10 & n.4.

On March 15, 2002, petitioners filed a habeas corpus petition in the United States District Court for the Southern District of Florida on behalf of a putative class of detained "credible fear" aliens from Haiti who arrived at the border on or after December 3, 2001. Petitioners also filed a complaint for declaratory and injunctive relief on behalf of the putative class. Pet. App. 10; Pet. 9-10. Petitioners alleged that the INS's application of the December 2001 policy adjustment violated the Due Process Clause of the Fifth Amendment, the immigration laws and INS's implementing regulations, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985). Petitioners asked the district court to order their release on parole on an emergency basis and to enter an injunction concerning

the INS's future processing of parole requests by members of the putative class. See Pet. 9-10.

On May 10, 2002, the district court dismissed two of the six named petitioners from the case because they had been paroled by the INS. Petitioners agreed that the grants of parole mooted the claims of those petitioners. Pet. App. 9 n.4.

b. By May 17, 2002, briefing on petitioners' emergency motion and the motion for class certification had been completed, both sides had provided additional information requested by the district court, and the court had received unsolicited supplemental pleadings. See Pet. App. 10-11. On that date, the district court denied petitioners' pending motions and dismissed the habeas corpus petition and complaint. *Id.* at 4-40.

The district court first addressed the significance of 8 U.S.C. 1252(a)(2)(B)(ii), which provides in pertinent part that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any * * * decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). The court concluded that Section 1252(a)(2)(B)(ii) denied it jurisdiction over challenges to discretionary parole decisions in particular cases, but allowed the court to exercise habeas corpus jurisdiction over petitioners' challenge to the INS's "statutory and constitutional authority to refuse them parole allegedly without making case-by-case determinations." Pet. App. 19; see *id.* at 18-20, 36-37.

Turning to the merits of that challenge, the district court rejected petitioners' due process claim because, as aliens stopped at the border and denied admission to the United States, petitioners lack any constitutionally protected right to parole and must instead rely on "the

statutory rights and privileges granted by Congress." Pet. App. 22; see generally *Zadvydas* v. *Davis*, 533 U.S. 678, 692-693 (2001); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, 214-215 (1953).

Next addressing petitioners' statutory claims, the court disagreed with their view that, under this Court's decision in *Jean*, "the Executive must maintain nationality-neutral parole criteria as a policy matter." Pet. App. 30. The court determined, instead, that the Acting Deputy Commissioner of the INS possessed the necessary delegated authority to adjust the INS's parole criteria in South Florida, see *id.* at 31-32, and that his concerns for "preventing loss of life and avoiding a mass migration from Haiti are facially legitimate and bona fide reasons" that adequately supported the December 2001 policy change. *Id.* at 35; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) (when Executive Branch denies admission to excludable aliens "on the basis of a facially legitimate and bona fide reason, the courts will n[ot] look behind the exercise of that discretion"). The district court also observed that the "demonstrated desperation" of aliens who leave Haiti by boat supported the INS's determination that such aliens were particularly unlikely to appear for their immigration proceedings if granted parole. Pet. App. 36.

The district court further determined that the December 2001 parole policy adjustment is a general statement of policy that is exempt under 5 U.S.C. 553(b) from the APA's procedural requirements for agency rulemakings. Pet. App. 38-39. The court noted that the December 2001 policy adjustment "d[id] not establish a binding norm" for parole determinations, but rather allowed INS officials to grant parole to Haitians covered by the new policy based on individualized

consideration of their particular parole applications. *Id.* at 38.

5. Petitioners appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. While the appeal was pending, three of the four remaining petitioners withdrew their requests for relief from removal to Haiti and voluntarily accepted removal from the United States. See Gov't Mot. to Dismiss Prospere and Notice of Intent to Remove Jeanty and Colas 2-3 (filed Nov. 19, 2002); Gov't Mot. to Dismiss Jeanty and Colas 2-4 (filed Dec. 23, 2002). The court of appeals dismissed those petitioners from the detention appeal, leaving petitioner Laurence St. Pierre as the only named petitioner still in the case. See Pet. App. 2.

On February 10, 2003, St. Pierre was removed to Haiti after the Board of Immigration Appeals upheld the removal order of an immigration judge and St. Pierre failed to seek judicial review of that decision.

On February 20, 2003, the court of appeals affirmed the district court's decision for the reasons stated by the district court. Pet. App. 3. Petitioners sought panel rehearing and rehearing en banc. The court of appeals denied the petition for panel rehearing. No judge voted for to rehear the case en banc. See *id.* at 41-42.

## ARGUMENT

This case concerns the application of an obsolete detention policy to Haitian aliens who are no longer in the United States. The petition does not present any live dispute. Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. This case is moot. All of the named petitioners have been removed from the United States and none is presently affected, or foreseeably will be affected, by the immigration authorities' rules for detaining arriving aliens who lack proper documentation. In this Court, moreover, petitioners neither contest the district court's failure to certify the case as a class action nor identify any putative class member, other than the named petitioners who have been removed to Haiti, who seeks to maintain this action. See generally *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 401-407 (1980) (discussing application of mootness principles in class action context).[2]

As an additional consideration weighing against review, the challenged INS policy adjustment that became effective in December 2001 has been superseded. On November 13, 2002, the INS published in the Federal Register a new policy—effective on that date—under which all non-Cuban aliens who arrive in the United States by sea, and who are inadmissible but establish a credible fear of persecution, "will be detained, with certain humanitarian exceptions, throughout those proceedings." *Notice Designating Aliens Subject to Expedited Removal Under Section*

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[2] Although the case is moot, the judgment below should not be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Petitioners do not seek that relief. In any event, the case became moot due to petitioners' own decisions. Of the four petitioners who were in the case when the district court entered its judgment, three voluntarily accepted their removal to Haiti. In declining to seek judicial review of her final administrative removal order, petitioner St. Pierre likewise "forfeited h[er] legal remedy" in the underlying immigration proceeding. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); see *Karcher* v. *May*, 484 U.S. 72, 83 (1987).

*235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68,924, 68,926 (2002). Petitioners' argument that the INS impermissibly singled-out Haitians for disfavored treatment under the December 2001 policy adjustment, see Pet. 15-22, therefore lacks ongoing significance.[3]

2. In addition to being moot and lacking ongoing significance, petitioners' legal arguments concerning their detention are without merit. First, there is no conflict between the court of appeals' decision in this case and *Jean* v. *Nelson*, 472 U.S. 846 (1985). In *Jean*, undocumented and unadmitted Haitians challenged the Attorney General's decision to depart from a general policy of parole for undocumented arriving aliens, and to adopt a policy of detention, without parole, for aliens who were not prima facie eligible for admission to the United States. The Haitians in *Jean* argued in part that the new policy violated equal protection principles because it discriminated based on race and national origin. See *id.* at 848-849. During the course of the litigation, the INS promulgated a new parole policy that, the parties agreed, "prohibit[ed] the consideration of race and national origin in the parole decision" concerning a particular alien. *Id.* at 851. This Court determined that the case before it could be resolved on the basis of the parties' agreement about the effect of the new parole regulations, and that there was no need to address the aliens' constitutional equal protection claim. *Id.* at 853-857.

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[3] As the November 13, 2002, *Notice* explained, "it is longstanding U.S. policy," reflected in provisions of the immigration laws themselves, "to treat Cubans differently from other aliens." 67 Fed. Reg. at 68,925.

As the district court correctly explained (Pet. App. 30), *Jean* does not support petitioners' position (Pet. 16-20) that the INS was barred in 2001 from adopting a new policy specifically to address the situation of Haitian migrants arriving in South Florida. To the contrary, it is well-accepted in the immigration area that policy adjustments may be implemented "to make a humane response to a natural catastrophe or an international political situation." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court sustained such a policy specifically directed to deterring dangerous travel by sea and illegal immigration by Haitian migrants. See *id.* at 163-166, 187-188. Nor is there anything in the immigration laws that bars the responsible officials from exercising in a categorical manner their discretion whether to release an alien from detention. See *DeMore* v. *Hyung Joon Kim*, 123 S. Ct. 1708, 1718-1719 (2003) (discussing *Carlson* v. *Landon*, 342 U.S. 524 (1952), and *Reno* v. *Flores*, 507 U.S. 292 (1993)); see also *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001).[4]

Second, the regulations governing parole were amended, effective in January 2001, specifically to

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[4] Nationality may be, and is, considered under the immigration laws even with respect to aliens who, unlike petitioners, have gained initial admission to the United States. For example, a permanent resident alien who is personally loyal to the United States nevertheless may be expelled if his nation becomes an enemy of the United States. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952). And nationality is a permissible basis for drawing immigration-related distinctions among aliens who are lawfully in this country, so long as the distinctions are not wholly irrational. See *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding registration requirements for Iranian students), cert. denied, 446 U.S. 957 (1980).

delegate the Attorney General's parole authority to, *inter alia*, the Deputy Commissioner of the INS. See Pet. App. 25, 31. The policy at issue here was adopted by the Acting Deputy Commissioner. This therefore is not a situation, as in *Jean* v. *Nelson*, in which low-level INS personnel allegedly were making parole determinations in contravention of official INS policy. See 472 U.S. at 853-854. Petitioners' arguments about the authority of the Acting Deputy Commissioner of the INS to adopt a new parole policy for South Florida (Pet. 20-22) are incorrect in light of that official's delegated authority. See Pet. App. 31-32. The authority of particular INS officials, moreover, has no prospective importance after the dissolution of the INS earlier this year. See note 1, *supra*.

Third, and also contrary to petitioners' argument (Pet. 23-24), this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), does not suggest that the district court possessed jurisdiction to review the application of the December 2001 detention policy in particular cases. The district court concluded that it had habeas corpus jurisdiction under 28 U.S.C. 2241 to review "the Attorney General's statutory and constitutional authority to refuse [petitioners] parole allegedly without making case-by-case determinations." Pet. App. 19. The district court further concluded, however, that it lacked jurisdiction to undertake "full APA-style judicial review of the Attorney General's discretionary parole decisions." *Id.* at 20 n.9. Those determinations are fully consistent with *Zadvydas*, in which the Court similarly rejected the proposition that 8 U.S.C. 1252(a)(2)(B)(ii) precludes habeas jurisdiction over challenges to "the extent of the Attorney General's [statutory] authority," and concluded that "§ 2241 habeas corpus proceedings remain available as a forum *for statutory and consti-*

*tutional challenges*," as opposed to "review of the Attorney General's exercise of discretion." 533 U.S. at 688 (emphasis added).

3. Petitioners' contentions that the district court overlooked supposed issues of material fact (Pet. 25-27), impermissibly failed to hold an evidentiary hearing (Pet. 27-28), and abused its discretion in failing to permit petitioners to conduct discovery (Pet. 28), involve no unsettled questions of law. Those contentions also have no importance beyond this particular case, which is moot in any event.

For example, petitioners are incorrect when they rely (Pet. 27) on 28 U.S.C. 2243's requirement that a hearing date must be set when the writ or an order to show cause is returned by the habeas corpus respondent. In this case, the court never ordered respondents to answer the habeas petition. Instead, the court determined that briefing on petitioners' emergency motion for temporary or preliminary injunctive relief fully addressed the issues in the case. See Pet. App. 13 & n.7. Furthermore, Section 2243's requirement that "a day shall be set for hearing" does not mean that a hearing actually must be held. See *Stewart* v. *Overholser*, 186 F.2d 339, 345 (D.C. Cir. 1950). As for petitioners' argument concerning discovery, habeas corpus petitioners do not posses any general right to take discovery. Cf. Rules Governing Section 2254 Cases in the United States District Courts, Rule 6(a) (discovery allowed only if judge grants discretionary leave to undertake it, for good cause shown) (28 U.S.C. 2254 note). Finally, insofar as petitioners' arguments concern the exercise of general federal question jurisdiction and the Federal Rules of Civil Procedure (see Pet. 25-27), they ignore that habeas corpus is ordinarily the proper avenue for claims that a person is in custody in

violation of federal law. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 554 (1974).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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